

ARKANSAS COURT OF APPEALSDIVISION I
No. CV-13-386ROGER MAXWELL WAINWRIGHT
APPELLANT/CROSS-APPELLEE

V.

NANCY (WAINWRIGHT)
MERRYMAN
APPELLEE/CROSS-APPELLANT**Opinion Delivered** March 12, 2014APPEAL FROM THE VAN BUREN
COUNTY CIRCUIT COURT
[NO. 71 DR-2011-116]HONORABLE DAVID M. CLARK,
JUDGEAFFIRMED ON DIRECT APPEAL;
AFFIRMED IN PART AND
REVERSED AND REMANDED IN
PART ON CROSS-APPEAL**JOHN MAUZY PITTMAN, Judge**

This case presents issues involving the division of marital property. The parties were married for eight years and made approximately the same amount of money. Appellant, the husband, promulgated discovery requests demanding that appellee wife account for all of her spending during the marriage on the theory that he paid more of the marital obligations and accrued some savings. For reversal, he argues that the trial court erred in failing to make an unequal division of marital property in his favor and in denying his motion to compel appellee to account for the disposition of all her personal income from the date of the marriage until the time of trial by producing bank statements. On cross-appeal, appellee argues that the trial court erred in refusing to consider her testimony that certain real property that she acquired during the marriage was a gift and in finding that a mattress that

she bought with a gift card would be sold as marital property. We affirm on direct appeal and affirm in part and reverse and remand in part on cross-appeal.

We review both factual and legal questions in traditional equity cases de novo on the record but, in deference to the trial court's experience with the parties and its superior position to determine credibility of the witnesses, will not reverse a finding of fact by the trial court unless it is clearly erroneous. *Allen v. Allen*, 99 Ark. App. 292, 259 S.W.3d 480 (2007). When the issues on appeal do not involve factual questions but rather the application of a legal doctrine, we do not defer to the trial court but instead determine whether the appellee was entitled to judgment as a matter of law. *Spears v. ReconTrust Co.*, 2013 Ark. App. 272.

In Arkansas, property distribution upon divorce is governed by Ark. Code Ann. § 9-12-315 (Repl. 2009), which, in pertinent part, provides that:

(a) At the time a divorce decree is entered:

(1)(A) All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration:

(i) The length of the marriage;

(ii) Age, health, and station in life of the parties;

(iii) Occupation of the parties;

(iv) Amount and sources of income;

(v) Vocational skills;

(vi) Employability;

(vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;

(viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and

(ix) The federal income tax consequences of the court's division of property.

(B) When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter;

(2) All other property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subdivision (a)(1) of this section, in which event the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage.

In subsection (b) of that statute, "marital property" is defined in pertinent part as all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement;

(2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(3) Property acquired by a spouse after a decree of divorce from bed and board;

(4) Property excluded by valid agreement of the parties;

(5) The increase in value of property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable on death or a transfer on death arrangement, or in exchange therefor[.]

Appellant argues that the trial court erred in failing to make an unequal division of marital property in his favor because he saved considerable amounts of his own income while appellee spent or concealed her own income. We do not agree. A spouse has the right to make a transfer of her property, either with or without consideration, even though she strips herself of all means of supporting her spouse, and leaves him without the means of subsistence, provided that she does so in good faith and without intention of defrauding the other spouse's claims upon her estate. *Skokos v. Skokos*, 332 Ark. 520, 968 S.W.2d 26 (1998). A spouse is not entitled to be reimbursed in a divorce proceeding for every nonconsensual transfer of marital funds made by the other spouse in the absence of proof of an intent to defraud. *Id.*

Appellant's argument that he is equitably entitled to an unequal division of the marital property is based on the testimony of a sister-in-law, who said that appellee had told her that some of appellee's marital income had been put in a safe in a farmhouse and entrusted to relatives for safekeeping. However, the witness was unable to say how much money had been saved or transferred in this way or even if it was a significant amount. Given the paucity of the evidence of any intent by appellee to defraud appellant, and the trial court's superior position to assess credibility, we cannot say that the trial court clearly erred in making an equal division of the marital property.

Nor did the trial court err in refusing to compel appellee to provide more than the past year's documentation of expenditures during the eight-year marriage. Arkansas Rule of Civil Procedure 26(b)(1) provides that parties may obtain discovery regarding any matter,

not privileged, which is relevant to the issues in the pending actions. However, Rule 26(c) states, “Upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” A trial court’s decision on discovery issues will not be reversed absent an abuse of discretion. *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002). Here, the bank records requested by appellant would entail significant expense to obtain; moreover, they were readily subject to subpoena by appellant from the financial institutions. Essentially, then, the question is not whether appellant could have obtained the documents that he sought but instead whether appellant or appellee would be required to pay for the cost of their production. A trial court has broad discretion in matters concerning discovery, and we cannot say that the trial court abused its discretion in refusing to compel production of the financial records. We affirm on direct appeal.

On cross-appeal, appellee argues that the trial court erred in dividing two items of property that she had acquired by gift. Such property is specifically excepted from the definition of marital property pursuant to Ark. Code Ann. § 9-12-315(b)(1). The property alleged to have been received as gifts consisted of three parcels of real property located in Van Buren County, Arkansas, and a mattress with box springs.

We agree that the trial court erred in its approach to the real property. The property was acquired by appellee during the marriage pursuant to three warranty deeds from appellee’s aunt reflecting that the parcels had been granted, bargained, and sold to appellee

for the sum of ten dollars, ten dollars, and one dollar, respectively. The trial court refused to consider appellee's testimony that no money had actually been exchanged and that the property was a gift because to do so would contradict the recitation in the deed that the property had been sold for a few dollars. This was error. We have held in nearly identical circumstances that the mere fact that the face of a deed recites that valuable consideration has been paid for land does not preclude a finding that the property was a gift where the recited consideration is nominal, the parties to the transaction are family members, and there is testimony that no consideration was actually paid. *Scott v. Scott*, 86 Ark. App. 120, 161 S.W.3d 307 (2004). We therefore reverse and remand for the trial court to reconsider the matter in light of the holding in *Scott*.

Finally, appellee argues that the trial court erred in failing to award to her as her separate property a mattress and box springs that she purchased years earlier with a gift card that appellant admittedly gave to appellee. We find no error on this point in light of evidence that appellee left the box springs and mattress when she entered the marital home during the proceedings, in violation of an order that she refrain from doing so, and took the objects she claimed as hers, both inside and outside the home, including even azalea and rose bushes that she dug up from their beds and replanted at the house where she was living at the time of trial. Property is abandoned when its possession is voluntarily forsaken by the owner. See *Schmidt v. Stearman*, 98 Ark. App. 167, 253 S.W.3d 35 (2007). Under these circumstances, we think that the trial court's conclusion that she had abandoned her claim to the mattress and box springs was a reasonable one, and we affirm on that point.

Affirmed on direct appeal; affirmed in part and reversed and remanded in part on cross-appeal.

WALMSLEY, J., agrees.

HIXSON, J., concurs.

Debra J. Reece, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Traci LaCerra*, for appellee.